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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 53.

GEORGE D. KER and DIANE K. KER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

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Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is submitting this brief with the consent of both parties. Said consents are being filed concurrently herewith with the Clerk of this Court. The American Civil Liberties Union is a non-partisan organization dedicated to the preservation of American constitutional civil liberties.

Amicus interest in the present case arises from its belief that the rights guaranteed by the Fourth Amendment have been breached. We believe that the actions of the law enforcement officers of California, sus-

tained by the courts of California, amounted to the unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments.

Statement of the Case.

On July 27, 1960, three Los Angeles County Deputy Sheriffs went to the apartment house where the petitioners resided. [R. 31, 60.] They then entered the petitioners' apartment, without obtaining a search warrant, and by means of a key obtained from the apartment house manager. (*Ibid.*) Immediately upon entry into the apartment, petitioners were told by the officers that they were "conducting a narcotics investigation." [R. 31, 61.] One of the officers then walked to the kitchen door, and then and there observed what he believed to be (and later was found to be [R. 50]) Marijuana. [R. 31, 61.] The petitioners were then placed under arrest [R. 32, 62], although no warrant for their arrest had been issued. [R. 149.] The apartment was then further searched [R. 63] and more Marijuana discovered. [R. 63, 52.] The following day, still without a search warrant, the automobile registered in the name of the petitioner, Diane K. Ker, was searched and more marijuana was discovered in that automobile. [R. 67.] Prior to entry into the apartment, no suspicion whatever attached to Diane K. Ker, and we suggest that in all events, the entire proceedings were unlawful as to her. The officers' conduct as to George D. Ker was based upon the following circumstances:

(1) Earlier the same evening Ker had been parked alone in his car for some minutes at a location at which a sale of narcotics not involving petitioner was known to have been completed the previous day. [R. 23-24, 20.]

(2) During part of this time and at this place, George D. Ker was observed talking with one of the persons involved in the sale of narcotics the day before. (*Ibid.*)

(3) The police officers had received information from various sources prior to the arrest that the petitioner, George D. Ker, was engaged in marijuana activity. [R. 30.]

(4) After George D. Ker left the location at which he had been observed, he made a U turn. [R. 24.]

Criminal proceedings were instituted against petitioners charging them with violating Section 11530 of the California Health and Safety Code. [R. 1.] At the commencement of trial, the petitioners moved under Section 995 of the Penal Code of California to set aside the information upon the ground they had been committed without reasonable and probable cause. [R. 3.] Evidence was taken on this point and the motion denied. (*Ibid.*) Thereafter, trial was had and the petitioners were found [R. 7, 8] and adjudged guilty. [R. 9.]

The District Court of Appeal, Second Appellate District, State of California, affirmed the conviction in its opinion filed August 29, 1961. [195 Cal. App. 2d 246,

15 Cal. Rptr. 767; R. 145-157.] Hearing was denied by the Supreme Court of the State of California in its order filed on October 25, 1961. [R. 158.] A petition for certiorari was filed in this Court and certiorari granted on January 22, 1962. (*Ibid.*)

Summary of Argument.

The purpose of the entry into the petitioners' apartment was to search for evidence; its discovery was not incidental to an arrest.

The surreptitious entry into the petitioners' home was an unreasonable search and seizure there being an absence of convincing evidence that the arrest could not have been effected in any other way provided by law.

The entry of a dwelling by police officers without a warrant for the purpose of searching to discover whether a crime has been committed, violates the Fourth and Fourteenth Amendments.

Evidence obtained by searches and seizures in violation of the Constitution is inadmissible.

ARGUMENT.

I.

The Search for the Contraband Was Not an Incident of the Arrest, but Rather Was the Purpose of the Entry.

In the probable cause hearing, deputy Berman, one of the arresting officers, testified:

> "We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received the key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthan and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriffs' Narcotics Officers and advised George Ker that we were conducting a narcotics investigation, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were conducting a narcotics investigation. I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed a brown package that had a small tear in it, a square package upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds. (R. 31.) . . . I then advised them that—the defendants that they were under arrest. I asked—I brought them back into the kitchen, showed them the kilo brick, what appeared to be Marijuana." [R. 32.]

When testifying before the jury, Deputy Berman recited exactly the same sequence of events:

> "We entered the apartment, I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered, he stood up and faced us. I displayed my identification, stated: 'We are Sheriffs' Narcotics Officers, conducting a narcotics investigation.' Simultaneously to that statement the defendant Diane Ker, walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway, I observed a small scale on the top of the sink. The top of the scale was the brick-like—brick-shaped package containing a green, leafy substance." [R. 61.]
>
> . . . "I then advised the defendants that they were under arrest for suspicion of violating the State Narcotics Law." [R. 62.]

Sergeant Warthan, who entered the apartment with Deputy Berman, is silent as to whether the arrest preceded or followed the search for the contraband.

Deputy Markman entered the apartment approximately a minute or minute and a half behind Deputy Berman and Sergeant Warthan. [R. 96.] When he entered the apartment, everyone was in the kitchen (*Ibid.*) and Deputy Berman was *at that time* placing the defendants under arrest. [R. 97.]

It is significant also that the contraband which precipitated the arrest was in the kitchen [R. 61], and

could not be seen without crossing the room to the kitchen door. (*Ibid.*)

The only evidence whatever contradicting the officers as to the sequence of events is, unfortunately, the testimony of the petitioner, George D. Ker. [R. 68-69.] Taking the transcript as a whole, however, he appears to be testifying more to his confusion and indignation at this unwarranted entry into his home than to a precise sequence of events.

Taking the testimony of the officers and recited twice under oath by Deputy Berman, the record points unmistakably to the conclusion that the arresting officers entered the living room, crossed the room past the petitioners to look into the kitchen, there discovered the contraband and *then* placed the petitioners under arrest.

Under these facts, it cannot be argued seriously that the purpose of this "extremely quiet" [R. 93] entry by means of a key procured from a reluctant manager [R. 93;—"He . . . wanted to call his attorney."] was for the principal purpose of arresting these petitioners. If an arrest did precede the search, and it did not, then the conclusion is almost inescapable that the arrest was only a pretext for the search. And this Court has held that: "An arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 285 U. S. 452, 467.

II.

In Either Event, However, the Surreptitious Entry Into a Man's Home to Effect an Arrest Violates the Fourth Amendment in the Absence of Convincing Evidence That the Arrest Could Not Be Effected in Any Other Way Provided by Law.

The point here is that when lawful procedures are available, then such clandestine procedures as here descend to the "unreasonable search and seizures" prohibited by the Fourth Amendment.

> "The Fourth Amendment and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U. S. 505, 511.

Looking at the record, one is struck by the paucity of evidence against George D. Ker prior to discovery of the contraband in his kitchen. This "evidence"—a conversation with a known narcotics violator at a location where a narcotics transaction was known to have been made a day earlier, unverified rumors over a period of several months, a U turn in the road—could not have supported a conviction nor an indictment. And it is further suggested that such "evidence" is so thin as to make the issuance of a search or arrest warrant highly doubtful.

The inference which leaps into the mind is that these officers resorted to this surreptitious and clandestine

conduct because they doubted that lawful means would meet their ends. The Fourth Amendment

> "prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. . . . The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the right for the protection of which it was adopted." *Go-Bart Company v. United States*, 282 U. S. 344, 357.

In speaking of a stealthy entry on another occasion, this Court held:

> "The prohibition of the 4th Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion." *Gouled v. United States*, 255 U. S. 298, 305.

Unquestionably, these officers were also motivated by their knowledge that such contraband is often disposed easily by flushing down the drains. [R. 93.] But we suggest that this is preferable to fostering the cancer of this surreptitious, clandestine, stealthy, furtive entry, without a warrant, into a man's home.

This court refused to tolerate much milder circumstances in *Johnson v. United States,* 333 U. S. 10. In that case officers smelled opium smoke which they traced to a particular hotel room. They knocked; they identified themselves. They placed the defendant, the only person in the room, under arrest. They then searched and found the opium and utensils.

Compare these facts with the case at hand. A witnessed conversation and a U turn in the road do not seem to be stronger evidence of the commission of a crime than the distinct odor of opium coming from a particular hotel room. The knock on the door stands on an infinitely better footing, we believe, than the surreptitious entry here. The arrest and then the search is at least on the same footing as the arrest here. And if we keep the testimony of the officers in mind, the arrest and then search in Johnson, was a little more palatable than the search and then arrest here.

But even these milder facts were unpalatable to this Court, which said about them (333 U. S. at 13-14):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the

usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime."

Parenthetically, the Court discussed this same point in *United States v. Lefkowitz*, 285 U. S. 452, 464, *supra*, saying (333 U. S. at 14):

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

This Court in weighing the facts in the *Johnson* case found much the same pretext criticized in *Lefkowitz*, and which appears to be so pronounced here, holding (333 U. S. at 16-17):

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

This is not to say that the detection and arrest of crime is not a matter of concern to society. But we insist, as has this Court, that:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States, supra,* 333 U. S. at 14.

III.

If the Entry Is Considered a Search, Then the Entry of a Dwelling, Whether Surreptitiously as Here or Otherwise for a Search of That Place Without a Warrant, Is Unlawful.

> "Belief, however well-founded, that an article sought is concealed in a dwelling-house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding facts unquestionably showing probable cause." *Agnello v. United States,* 269 U. S. 20, 33.

The argument presented under point II has equal application here. We would further cite, for this proposition, however, *Chapman v. United States,* 365 U. S. 610 and *Taylor v. United States,* 286 U. S. 1. All evidence obtained by searches and seizures in violation of the Constitution is inadmissible. *Mapp v. Ohio,* 367 U. S. 643.

Conclusion.

We are not unsympathetic with the law enforcement officers and their problems in detecting and apprehending violators. Nor are we unconscious of the vicious nature of the crime alleged against the defendants.

It is our view, however, that to permit the law enforcement officers, no matter how well-intentioned, to make surreptitious and clandestine entries as here, without even the semblance of judicial control, is to cut away the heart of the Fourth Amendment. The long-range effect of such tactics on American Constitutional liberties cannot be viewed with equanimity.

Because of this, we urge the Court to hold that evidence obtained as here is evidence obtained through an unconstitutional search and seizure. And as such, it is inadmissible. And that therefore the convictions of these petitioners must be set aside.

Respectfully submitted,

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